Supreme Court, U.S.
FILED
NOV 13 1995
OFFICE OF THE CLERK

(3)

No. 95-546

In The

Supreme Court of the United States

October Term, 1995

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
a special purpose Wisconsin municipal corporation,

Petitioner,

v.

S.A. HEALY COMPANY,
an Ohio corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

MILWAUKEE METROPOLITAN
SEWERAGE DISTRICT

MICHAEL J. MCCABE
Director of Legal Services
Wis. State Bar No.: 01011060

ROBERT CRAWFORD
Senior Staff Attorney
Wis. State Bar No.: 01009404
Counsel of Record

Attorneys for Petitioner

P.O. Box 3049
Milwaukee, Wisconsin
53201-3049
(414) 225-2104

fax no.: (414) 225-0167

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

4 pp

I. Forum Shopping

The Seventh Circuit worried that forum shopping would result if FED. R. CIV. P. 68 preempted the Wisconsin rule, and the respondent sounded the same theme. App. 11a; Respondent's Brief 5. This misstates the law. A resident defendant is barred from invoking diversity jurisdiction and removing to federal district court. 28 U.S.C. § 1441(b) (1988). As a Wisconsin corporation, the petitioner cannot remove to federal court in Wisconsin.

Moreover, it was unnecessary for the Seventh Circuit to balance *Erie's* twin aims, (1) discouragement of forum-shipping and (2) avoidance of inequitable administration of the laws. When determining whether a federal procedural rule preempts an analogous state procedural rule, "[t]he first question must . . . be whether the scope of the federal rule in fact is sufficiently broad to control the issue before the Court." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). Chief Judge Posner recast this first question, asking whether the Wisconsin rule is "so entwined with procedures prescribed by the federal rules that it is likely to impair the integrity of federal procedure if it is applied in diversity cases?" App. 10a. As recast by Chief Judge Posner, the first question expresses a *preference* for the state rule in diversity cases, a preference that displaces the federal rule so long as the integrity of federal procedure is unimpaired, a preference at odds with the Court's insistence that the federal rule preempt the state rule under the Rules Enabling Act whenever the federal rule is sufficiently broad to cover the point in dispute. The Seventh Circuit's answer to this first question conflicts with *Burlington Northern Railroad Company v. Woods*, 480 U.S. 1 (1987), conflicts with *Stewart*

Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988), and compels review on certiorari.

II. Absence of Circuit Conflict

The respondent argues that review on certiorari is unwarranted because no conflict exists between the Seventh Circuit's decision and decisions from other circuits. Respondent's Brief 6. Respondent's argument is a straw-man. The petitioner seeks review on certiorari because the Seventh Circuit's decision conflicts with the Court's decisions in *Burlington Northern Railroad Company v. Woods* and *Stewart Organization, Inc. v. Ricoh Corp.* under S. Ct. R. 10(c) and not because of a circuit conflict.

While the Seventh Circuit cited three federal decisions as supportive, the Seventh Circuit's rationale stands alone. App. 10a-11a. For instance, neither *Tanker Management, Inc. v. Brunson*, 918 F.2d 1524, 1528-29 (11th Cir. 1990) nor *Fauber v. KEM Transportation & Equipment Co.*, 876 F.2d 327, 331-32 (3d Cir. 1989), considered *Burlington Northern Railroad Co. v. Woods, Stewart Organization, Inc. Ricoh Corp.*, and the Court's holdings that a federal rule is sufficiently broad to preempt the state rule under the Rules Enabling Act when the federal rule and state rule are sufficiently coextensive. Similarly, the third case cited by the Seventh Circuit, *Jarvis v. Johnson*, 668 F.2d 740, 745-46 (3d Cir. 1982), never considered Rule 68 and never considered whether Rule 68 was coextensive with the state rule that allows prejudgment interest in tort cases. Consequently, these three lower court decisions afford no support for the Seventh Circuit's rationale and no basis

for asserting a conflict among the circuits as a reason for review on certiorari.

III. Issue Preserved for Review on Certiorari

Finally, the respondent urges that some arguments offered in the certiorari petition were waived. Respondent's Brief 7-11. To the contrary, the arguments that the respondent points to highlight the court of appeals' error, do not raise a new claim, and underscore the need for review on certiorari. " 'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 965 (1995) (*quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

Respectfully submitted,

MILWAUKEE METROPOLITAN
SEWERAGE DISTRICT

MICHAEL J. MCCABE
Director of Legal Services
Wis. State Bar No.: 01011060

ROBERT CRAWFORD
Senior Staff Attorney
Wis. State Bar No.: 01009404
Counsel of Record

Attorneys for Petitioner